

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WELDON W. VITTITOW and
LOUISE M. VITTITOW,

Plaintiffs,

v.

BANK OF AMERICA, NATIONAL
ASSOCIATION; US BANK
NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE HOLDERS OF
THE BEAR STEARNS ALT-A
TRUST 2006-3 MORTGAGE PASS-
THROUGH CERTIFICATES SERIES
2006-3; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Defendants.

No. 2:CV-14-0230-SMJ

**ORDER DENYING PLAINTIFFS'
MOTION TO REMAND AND
GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

I. INTRODUCTION

Before the Court, without oral argument, are Plaintiffs' Objection to Defendant's Notice of Removal, ECF No. 8, Defendant Bank of America, N.A.'s ("BANA") Motion to Dismiss Plaintiffs' Complaint, ECF No. 3, and Defendants U.S. Bank National Association, as Trustee for the Holders of the Bear Stearns Alt-A Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3 ("US Bank") and Mortgage Electronic Registration Systems, Inc.'s ("MERS") Motion

1 to Dismiss Plaintiffs' Complaint, ECF No. 7. Plaintiffs maintain this matter
2 should be removed to state court while Defendants seek dismissal of this matter
3 for failure to state a claim. The Court, having reviewed the pleadings and file in
4 this matter, is fully informed and finds this matter was properly removed as the
5 amount in controversy exceeds \$75,000, and that Plaintiffs' claims must be
6 dismissed with prejudice.

7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

8 **A. Factual Background¹**

9 A Statutory Warranty Deed record on May 27, 1999, indicates Plaintiffs
10 received possession of the property located at 2830 South Lakeshore Drive,
11 Chelan, WA 98816 ("Property"). On January 25, 2006, Plaintiffs took out a loan
12 and signed a promissory note stating that they owed the lender \$945,000. The
13 loan was secured by a Deed of Trust ("Deed") that was signed by Plaintiffs and
14 recorded on January 31, 2006, which identifies Eagle Home Mortgage, Inc. as the
15 lender, Transnational Title and Escrow Company as the trustee, and MERS as the
16 beneficiary, in a nominee capacity for the lender and its heirs and assigns. On
17 November 3, 2011, MERS recorded an assignment of the Deed indicting the

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19 ¹ The factual history recited herein is based on the factual allegations in the Complaint, ECF No. 1-2, and in the
20 extrinsic documents incorporated therein. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court assumes to
be true those portions of the Complaint that "contain sufficient allegations of underlying facts to give fair notice
and to enable the opposing party to defend itself effectively," but the Court does not afford the presumption of truth
to allegations that "simply recite the elements of a cause of action." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
2011).

1 transfer of the loan to U.S. Bank as trustee for the investor. Plaintiffs' Complaint
2 does not allege that any foreclosure has been initiated against the property.

3 Plaintiffs' Complaint makes the factual assertion that the Deed stated "[a]n
4 assignee of a Deed of Trust and Note must give the debtor written notice of such
5 Assignment within thirty (30) days after the Assignment." ECF No. 1-2 at 12 ¶14.
6 The Court, after carefully reviewing the Deed, finds no such statement contained
7 in the document. The absence of the statement in the Deed was also noted by
8 defense counsel. *See* ECF No. 7 at 4. To the contrary, the Deed that Plaintiffs
9 signed specifically states that "[t]he Note or a partial interest in the Note (together
10 with this Security Instrument) can be sold one or more times without prior notice
11 to Borrower." ECF No. 1-2 at 31 ¶20.

12 **B. Procedural Background**

13 On April 16, 2014, Plaintiffs filed a Complaint with the Clerk of the
14 Superior Court of Chelan County, Washington, seeking "Declaratory Action" and
15 alleging "Breach of Contract" and "Fraud and Misrepresentation." ECF No. 1-2
16 at 12-16. BANA removed this matter to this Court on July 16, 2014. ECF No. 1.
17 On August 13, 2014, Plaintiffs timely filed an objection to removal, which this
18 Court has construed as a motion to remand.² ECF No. 8. On July 23, 2014, and
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² A document filed *pro se* is "to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 104–105 (1976).

1 August 6, 2014, Defendants filed separate motions to dismiss Plaintiffs' claims.
2 ECF Nos. 3 & 7.

3 **III. PLAINTIFFS' MOTION TO REMAND**

4 Plaintiffs object to removal of this matter and ask that this case be
5 remanded back to state court. In relevant part, the federal removal statute
6 provides:

7 (a) Except as otherwise expressly provided by Act of Congress, any
8 civil action brought in a State court of which the district courts of the
9 United States have original jurisdiction, may be removed by the
10 defendant or the defendants, to the district court of the United States
11 for the district and division embracing the place where such action is
12 pending.

13 28 U.S.C. § 1441(a). "The defendant bears the burden of establishing that
14 removal is proper." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582
15 F.3d 1083, 1087 (9th Cir. 2009). "The removal statute is strictly construed against
16 removal jurisdiction," *id.*, and removal jurisdiction "must be rejected if there is
17 any doubt as to the right of removal in the first instance," *Geographic
18 Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1107 (9th Cir. 2010) (citation
19 and quotation marks omitted).

20 A federal district court generally has original jurisdiction over a civil action
when: 1) a federal question is presented in an action "arising under the
Constitution, laws, or treaties of the United States" or 2) there is complete

1 diversity of citizenship and the amount in controversy exceeds \$75,000. *See* 28
2 U.S.C. §§ 1331, 1332(a).

3 Here, Plaintiffs maintain that diversity jurisdiction does not exist as the
4 amount in controversy is not met. ECF No. 8. However, while Plaintiffs never
5 specified a dollar amount as part of their quiet title action, “[i]n actions seeking
6 declaratory or injunctive relief, it is well established that the amount in
7 controversy is measured by the value of the object of the litigation.” *Henderson v.*
8 *Nationstar Mortgage Co.*, 2008 WL 302374 at *1 (W.D. Wash. 2008) (citing
9 *Hunt v. Wash. State Appel Adver. Comm’n*, 432 U.S. 333, 347 (1977)). Here,
10 Plaintiffs seek a declaratory finding that “defendants have no right, title, estate,
11 lien, or interest in *the property*.” ECF No. 1-2 at 12. Accordingly, Plaintiffs seek
12 a finding that would void Defendants’ secured interest in the Property, to wit: the
13 mortgage valued at \$945,000. Therefore, as the object of the litigation is a
14 \$945,000 mortgage, this Court has diversity jurisdiction as the amount in
15 controversy far exceeds the \$75,000 threshold. Plaintiffs’ construed motion to
16 remand is denied.

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IV. DEFENDANTS MOTIONS TO DISMISS

Each Defendant has moved to dismiss Plaintiffs' Complaint, ECF No. 1-2, asserting that Plaintiffs have failed to state a claim.

A. Legal Standard

A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where the factual allegations do not raise the right to relief above the speculative level. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly show that the pleader is entitled to relief. *Twombly*, 550 U.S. at 555. In ruling on a motion under Rule 12(b)(6), the Court construes the pleadings in the light most favorable to Plaintiffs and accepts all material factual allegations in the complaint, as well as any reasonable inferences drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Mere legal conclusions "are not entitled to the assumption of truth." *Id.* The complaint must contain more than "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The Court may, therefore,

1 dismiss a claim as frivolous where it is based on an indisputably meritless legal
2 theory or where the factual contentions are clearly baseless. *See Neitzke*, 490 U.S.
3 at 327. Unless it is absolutely clear that amendment would be futile, a *pro se*
4 litigant must be given the opportunity to amend his complaint to correct any
5 deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

6 **B. Discussion**

7 1. Quiet Title

8 Plaintiffs seek to quite title to the Property claiming that they were not
9 provided notice of the assignment of the Deed, do not know who owns the Deed,
10 and assert “defendants claim an interest adverse to plaintiff’s title in *the property*.”
11 ECF No. 1-2 at 12. Plaintiffs also request “[j]udgment quieting plaintiff’s fee
12 simple title to *the property*, and determining that defendants have no right, title, or
13 interest in or to *the property*.” ECF No. 1-2 at 13. However, Plaintiffs are not
14 entitled to quite title.

15 Quite title actions are “designed to resolve competing claims of
16 ownership . . . [or] the right to possession of real property.” *Kobza v. Tripp*, 105
17 Wn. App. 90, 95 (2001). Here, based upon the Deed and assignment, Defendants
18 do not assert title to the Property, but rather only assert a security interest. When
19 Plaintiffs signed the Deed in January 2006, they created a secured lien on the
20 Property and did not convey any ownership interest or right to possession of the

1 Property. *See* RCW 7.28.230(1) (“A mortgage of any interest in real property
2 shall not be deemed a conveyance so as to enable the owner of the mortgage to
3 recover possession of the real property, without a foreclosure and sale according
4 to law”); *Kendrick v Davis*, 75 Wn.2d 456, 469 (1969) (“It is, of course, hornbook
5 law that a mortgagee has no right to possession of mortgaged real property
6 without a foreclosure and sale according to law.”). Here, no foreclosure has
7 occurred. Accordingly, because Defendants do not assert title to the Property but
8 merely either had³ or maintain a secured interest in the Property, Plaintiffs cannot
9 maintain a quiet title action against Defendants as a matter of law. Therefore,
10 Plaintiffs’ Quiet Title Action must be dismissed.

11 2. Assignment of the Deed of Trust

12 Next, throughout Plaintiffs’ Complaint are numerous references to alleged
13 improper assignment of the Deed and Note. First, by the very terms of the Deed,
14 Plaintiffs did not have to receive notice of any assignment. *See* ECF No. 1-2 at 31
15 ¶20. Additionally, Plaintiffs, as borrowers, do not have standing to challenge any
16 assignments of the Deed. It is a well-established point of law that borrowers lack
17 standing to challenge the assignment of their Deed, as they are non-parties to the
18 assignment. *See e.g. Ukpoma v. U.S. Bank Nat’l Ass’n*, No. 12-CV-0187-TOR,
19 2013 U.S. Dist. LEXIS 66576, at *13 (E.D. Wash. May 19, 2013) (“Even
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³ Based upon the assignment, MERS no longer has any secured interest in the Property.

1 assuming for the sake of argument that the assignments in question were
2 fraudulently executed, Plaintiff, as a third party, lacks standing to challenge
3 them.”); *Borowski v. BNC Mortgage, Inc.*, No. C12-5876, 2013 U.S. Dist. LEXIS
4 122104, at *13 (W.D.Wash. Aug. 27, 2013) (“[B]orrowers, as third parties to the
5 assignment of their mortgage (and securitization process), cannot mount a
6 challenge to the chain of assignments. . .”); *Frazer v. Deutsche Bank Nat’l Trust*
7 *Co.*, 11-CV-5454-RBL, 2012 WL1821386, at *2 (W.D. Wash. May 18, 2012)
8 (“Plaintiffs are not parties to the pooling and servicing agreement and present no
9 authority suggesting standing to challenge it.”). Accordingly, here, to the extent
10 that Plaintiffs assert the Deed was not properly assigned, was not properly
11 transferred into the trust, or that they were not provided notice, the claims fail as a
12 matter of law because Plaintiffs lack standing to challenge the assignment and
13 securitization of their loan. Therefore, the “Declaratory Action” that Plaintiffs’
14 Complaint seeks is impermissible as a matter of law and must be denied.

15 3. Production of the Original Note

16 Plaintiffs maintain they are entitled to production of the “original wet ink
17 signature promissory note.” ECF No. 1-2 at 12 ¶18. However, Washington
18 appellate courts have repeatedly held that Washington’s Deed of Trust Act
19 (“DTA”) does not require a lender to produce the original Note as a condition of
20 the non-judicial foreclosure. *See, e.g., Broaught v. Tarabochia*, 104 Wn.App.

728, 731-35 (2001) (enforcing Note despite failure to produce the original). Federal courts likewise have rejected the “show me the Note” argument. *See Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115 (W.D. Wash. 2010); *Freeston v. Bishop, White & Marshall*, 2010 WL 1186276 (W.D. Wash. 2010); *Wallis v. IndyMac Fed.Bank*, 2010 WL 2342530, *5 (W.D. Wash. 2010). Moreover, the DTA only requires the trustee to possess proof of the ownership of loan. It does not require the trustee to then provide this proof to the borrower prior to a trustee’s sale. RCW 61.24.030(7). Accordingly, Plaintiffs claims regarding the original “wet ink” Note fail as a matter of law.

4. Breach of Contract Claim

Plaintiffs’ assert in Count II, a Breach of Contract claim, that Defendants failed to give full disclosure of the loan and failed to inform Plaintiffs that the Note would be converted into securities and sold to investors. ECF No. 1-2 at 13. “A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damages to the claimant.” *Northwest Indep. Forest Mfrs. v. Dep’t of Labor and Indus.*, 78 Wn. App. 707, 712 (1995). Plaintiffs’ Complaint fails to allege any duty that was breached or demonstrate any proximately caused damages. Moreover, the Plaintiffs misrepresent the facts. The Deed, which is incorporated by reference into the Complaint, belies each of Plaintiffs’ alleged factual claims. While Plaintiffs assert

1 they were not given full disclosure of the loan, each page of the fifteen-page Deed
2 is initialed by Plaintiffs and concludes with signatures from both Plaintiffs
3 acknowledging and accepting all the “terms and covenants” of the Deed.
4 Furthermore, while Plaintiffs maintain they did not know the Note could be
5 converted into securities and sold to investors, the Deed specifically states that
6 “[t]he Note or a partial interest in the Note (together with this Security Instrument)
7 **can be sold one or more times** without prior notice to Borrower.” ECF No. 1-2
8 at 31 ¶20 (emphasis added). Not only have Plaintiffs failed to properly allege a
9 breach of contract claim, but also the factual basis for that claim is contradicted by
10 the very terms of the Deed that Plaintiffs signed. Accordingly, Plaintiffs breach of
11 contract claim must be dismissed.

12 5. Fraud and Misrepresentation Claim

13 Finally, Plaintiffs attempt to assert a fraud and misrepresentation claim in
14 Count III. However, to state a claim for fraud Plaintiffs must allege “(1) A
15 representation of an existing fact, (2) its materiality, (3) its falsity, (4) the
16 speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it
17 should be acted on by the person to whom it is made, (6) ignorance of its falsity
18 on the part of the person to whom it is made, (7) the latter's reliance on the truth of
19 the representation, (8) his right to rely upon it, [and] (9) his consequent damage.”
20 *Kirkham v. Smith*, 106 Wn. App. 177, 183 (2001); *see also Stiley v. Block*, 130

1 Wn.2d 486, 505 (1996). “In alleging fraud or mistake, a party must state with
2 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P.
3 9(b). The complaining party must plead both the elements and circumstances of
4 fraudulent conduct.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d
5 107, 165 (1987). Here, Plaintiffs do not identify any false representations or any
6 misrepresentations. Instead, Plaintiffs make additional allegations of failures in
7 the assignment and securitization of the Deed and Note. As previously discussed,
8 the Plaintiffs lack standing to challenge the assignment and securitization of the
9 Deed and Note. Additionally, to the extent that Plaintiffs allege the assignment
10 was not properly recorded, the recording of an assignment not only has no impact
11 upon the debtor, but also has no impact on the validity of the assignment. *See e.g.*
12 *In re United Home Loans*, 71 B.R. 885, 891(W.D. Wash. 1987), aff’d 876 F.2d
13 897 (9th Cir. 1989) (“assignment of a deed of trust and note is valid between the
14 parties whether or not the assignment is ever recorded”; “Recording of the
15 assignments is for the benefit of third parties”). Accordingly, Plaintiffs’ fraud and
16 misrepresentation claim is insufficiently pled. At best, this claim is founded upon
17 an allegation that Plaintiffs both lack standing to raise and has no impact upon the
18 validity of the Deed nor Plaintiffs’ obligation to repay the loan. Therefore,
19 Plaintiffs’ fraud and misrepresentation claim must be dismissed.

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V. CONCLUSION

Ultimately, the Court finds Plaintiffs' claims were frivolous as they were based on indisputably meritless legal theories and the factual contentions were clearly baseless, and often contradicted by the terms of the very Deed Plaintiffs' signed. Accordingly, the Court finds amendment of the complaint would be futile.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Construed Motion to Remand, **ECF No. 8**, is **DENIED**.
2. Defendant Bank of America, N.A.'s Motion to Dismiss Plaintiffs' Complaint, **ECF No. 3**, is **GRANTED**.
3. Defendants U.S. Bank National Association, as Trustee for the Holders of the Bear Stearns Alt-A Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3 and Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Complaint, **ECF No. 7**, is **GRANTED**.
4. As the Court finds that amendment of the complaint would be futile, all claims are **DISMISSED WITH PREJUDICE**.
5. All hearings and other deadlines are **STRICKEN**.


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1 **6.** The Clerk's Office is directed to **CLOSE** this file.

2 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
3 and provide copies to all counsel and to Plaintiffs.

4 **DATED** this 10th day of October 2014.

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7 SALVADOR MENDOZA, JR.
8 United States District Judge
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